

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF IDAHO

IN RE

DAVE SILVA, d/b/a NOS OTNOS,
INC., and SHARON SELMASSKA,
a/k/a SHARON SILVA, d/b/a
NOS OTNOS, INC., d/b/a S & S
CLEANING,

Debtors.

BARBARA J. WUSSLER,

Plaintiff,

vs.

DAVE SILVA, d/b/a NOS
OTNOS,

Defendant.

Case No. 93-02385

Adv. No. 94-06203

MEMORANDUM OF DECISION

H. Paul Kondrick, San Diego, California, and Stephen J. Olson,
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, Boise, Idaho,
for Plaintiff.

Robert Vreeland, Bloomfield, New Jersey, and Laura Burri,
RINGERT, CLARK, CHARTERED, Boise, Idaho, for Defendant.

JIM D. PAPPAS, CHIEF U.S. BANKRUPTCY JUDGE.

I. Background and Status of the Case

In August 1993, Defendant David J. Silva filed a bankruptcy petition under Chapter 13 of the Bankruptcy Code. The case was converted to Chapter 7 on January 5, 1994. On March 18, 1994, Silva's former spouse, Plaintiff Barbara Wussler, initiated this adversary proceeding seeking a determination that certain obligations owed by Defendant to Plaintiff stemming from a California state court default judgment were excepted from discharge in bankruptcy. The default judgment in the amount of \$204,990.62 was entered against Defendant in June 1984. It resulted from litigation between Plaintiff and Defendant concerning ownership and control of the assets of a business known as Jose's Court Room, Inc. ("Court Room"), and a residence referred to by the parties as the Solana Beach property, all located near San Diego.

In August 1994, Plaintiff moved for summary judgment asserting the state court default judgment was entitled to collateral estoppel effect in this adversary proceeding. In response, Defendant challenged the validity of the default judgment obtained in California against him, asserting he did not receive proper notice of Plaintiff's request to enter the default judgment against him. This Court, in a Memorandum of Decision issued February 1, 1995, declined to

make a determination as to the validity of the default judgment, or to attempt to decipher its seemingly ambiguous language. *Wussler v. Silva*, 95 I.B.C.R. 19, 23. Instead, the Court stayed the adversary proceeding and directed the parties back to the California state court to obtain a determination of the validity of the judgment and a clarification of its provisions.

This Court's efforts to secure guidance from the state court proved inefficient and ineffective. Some four years later, the parties returned with a decision from the California court issued on December 18, 1998. Unfortunately, the decision did little to clarify the issues raised here. Armed with the state court's decision, the parties pursued cross-motions for summary judgment. This Court issued a Memorandum of Decision on June 22, 1999, denying the motions. *Wussler v. Silva*, 99.2 I.B.C.R. 77.¹

¹ The state court refused to grant Defendant's request to set aside the judgment. It did conclude, however, that the judgment had been renewed without any notice to Defendant or to his attorneys. If the judgment was not properly renewed, this Court must wonder why the state court did not declare the judgment invalid on those grounds. Moreover, the state court judge who reviewed the issues, a different judge than had originally entered the judgment, found the judgment's characterization of the Defendant's conduct, upon which the award of punitive damages was based, to be vague and unintelligible. Declaration of Richard C. Norton in Support of Motion for Summary Judgment, Exhibit C: Judgment After Trial by Court, p. 4. Given the state court's holdings, and while Plaintiff argues otherwise, this Court adheres to the position that the findings in the judgment are not entitled to collateral estoppel effect for purposes of determining dischargeability of the judgment debt under 11 U.S.C. § 523(a). *Wussler v. Silva*, 99.2 I.B.C.R. 77, 79-80.

At long last, a trial of the adversary proceeding on the merits was conducted on March 2 and 3, 2000, after which all issues were taken under advisement. After trial, the parties submitted written arguments and authorities, which the Court has now duly considered, along with the evidence, testimony and record. The following constitutes the Court's findings of fact and conclusions of law. Fed. R. Bankr. P. 7052.

II. Facts

There are disputed issues of fact raised in this action. The findings of fact contained in this decision reflect the Court's resolution of those issues. In so doing, the Court has weighed the credibility of the various witnesses testifying at trial, assigning significance to some testimony and evidence, while discounting the weight assigned to other matters. From this process, the following facts appear.

Plaintiff and Defendant were married on August 20, 1955. They lived in New Jersey and had five children. In 1976, after twenty years of marriage, the couple divorced. Under their property settlement agreement, Defendant agreed and was ordered to purchase a house for Plaintiff and the children and to pay child support of at least \$600 per month. Defendant

purchased a home in Cedar Grove, New Jersey, commonly referred to by the parties as the "Fairview Avenue" property, for Plaintiff and the children.

Defendant deeded the property to Plaintiff on August 25, 1978. Defendant made the monthly mortgage payments.

In addition to working for others, Defendant was also involved as a principal in many different business ventures both during his marriage to Plaintiff and following the divorce. Plaintiff served as a bookkeeper for several of these businesses. These businesses are, for the most part, not relevant here.

However, one is important. In 1978, Defendant was interested in purchasing a restaurant/lounge in the San Diego area. One of Defendant's other ventures, California Sprinter, a moped manufacturer, had been sold and Defendant wanted to use the proceeds to purchase the Court Room, a restaurant/lounge in La Jolla, California.

At roughly the same time, the Silvas' daughter expressed interest in attending college in the San Diego area. Plaintiff was experiencing financial pressures. Defendant approached Plaintiff about possibly moving to California. In California, Plaintiff and the daughter could live together, and Plaintiff could work as a bookkeeper at the Court Room. Before the purchase of the Court Room was completed, Plaintiff and Defendant traveled to California to allow

Plaintiff to look around and decide whether she wanted to move. While in California, Plaintiff attended a meeting at which Defendant discussed the purchase of the Court Room with the sellers and others. Plaintiff also looked at houses while in California, and fell in love with the Solana Beach property. After her visit, Plaintiff decided to move to California.

On July 21, 1978, Plaintiff and Defendant both executed an affidavit submitted to California authorities to support an application for a liquor license to be used in the Court Room. In the affidavit, Plaintiff is not listed as a stockholder of the Court Room, although the affidavit does identify her as the Secretary/Treasurer of the Court Room. Defendant checked the "stockholder box" on the form affidavit.

Defendant completed the purchase of the Court Room in July 1978 with proceeds from the sale of California Sprinter and by refinancing property he owned at West Bradford Avenue in Cedar Grove, New Jersey. Plaintiff, in her capacity as Secretary/Treasurer of the Court Room, signed the stock certificate issued by the corporation to Defendant as the sole owner of the Court Room.

In October 1978, Defendant purchased the Solana Beach property by paying approximately \$27,000 down and financing the remaining purchase price. Title to the property was placed in Defendant's name. Plaintiff moved to

California, began working at the Court Room as a bookkeeper. She lived in the Solana Beach property. Income from the business was used to pay the payments for the purchase obligations on both the business and the house, and to pay Plaintiff a salary.

Plaintiff agreed that, as had been the case during their marriage, Defendant should handle all the details concerning the sale of her New Jersey home. In December 1978, the Fairview Avenue property was sold for approximately \$80,000. From the record, it appears the existing mortgage on the property, for which Defendant was responsible, was satisfied from the house sale proceeds, and that after paying sales costs, Defendant received a check for \$28,465.18 in net proceeds. On January 11, 1979, Defendant cashed this check and used the money, together with approximately \$72,000 of his other funds, to purchase a "jumbo" certificate of deposit ("CD"). Of the CD's \$100,000 principal, Defendant testified that he considered himself the owner of a twenty percent interest, and that Plaintiff owned an eighty percent interest, representing the value of Plaintiff's interest in the Fairview Avenue property. Defendant testified that he took steps to protect Plaintiff's interest in the CD by making appropriate provisions in his will, and by naming Plaintiff as the beneficiary of several life insurance policies worth approximately \$250,000. Plaintiff was

aware Defendant put the house money into the CD; she did not object to this decision.

In May 1979, William Dalton, the bar manager at the Court Room, sued Defendant, Michael Mangnanti, and the Court Room in state court asserting the existence of an oral partnership agreement between the parties, and that he should be declared a one-third owner of the business. In that suit, Plaintiff was not named as a defendant, nor did she seek to intervene in the action. Defendant submitted a declaration in the action stating that in October 1978 he alone had purchased all issued and outstanding stock in the Court Room and, as of that date, he personally owned all the stock in the Court Room. Dalton's suit was unsuccessful.

Following Silvas' divorce, and after Plaintiff moved to California, Plaintiff and Defendant maintained an intimate relationship. At some point, this relationship ended. Plaintiff thereafter became personally involved with William Wussler ("Wussler"). Wussler was a long-time acquaintance of the Silvas and worked for Defendant as a bartender at several of Defendant's restaurant ventures in New Jersey. Wussler, with Defendant's encouragement, moved to California to be the bartender at the Court Room. Defendant arranged for the repair of Wussler's vehicle to take him to California and for Wussler to stay in

guest quarters at the Solana Beach property. However, Defendant became displeased with the condition and operation of the restaurant under Wussler's supervision and later fired him.

In 1981, Plaintiff filed a lawsuit against Defendant in California state court claiming, among other things, that Defendant was guilty of breach of contract, fraud, and conversion. Defendant filed a counterclaim against Plaintiff and a third party claim against Wussler alleging breach of fiduciary duty, conversion, negligence, and civil conspiracy. On September 25, 1981, the state court issued an order and preliminary injunction granting Defendant control of the Court Room pending the outcome of the litigation and enjoining Plaintiff from entering the premises without Defendant's consent. Despite the injunction, Defendant agreed Plaintiff could continue in her capacity as the paid bookkeeper of the Court Room.

The litigation then stalled. The parties discussed settlement as early as October 1982. Defendant was interested in ending his involvement in California, and accepted a job with Ricoh in New Jersey. By May 1984, the parties had tentatively agreed to a resolution, and a proposed Settlement Agreement and General Release was drafted by Plaintiff's attorney for the parties to sign, which was sent to Defendant's lawyer. Under this agreement,

Defendant would transfer title of the Solana Beach property and 100% of the stock of the Court Room to Plaintiff. In turn, Plaintiff would assign her rights in the CD to Defendant. The Settlement Agreement was never signed by the parties. However, believing the matter was settled, Defendant left the area. Defendant testified that he believed Plaintiff's counsel would take care of the details of the settlement, but he denies ever having been given a copy of the documents prepared and allegedly sent to his attorney.

After Defendant moved back to New Jersey, the litigation again heated up. On May 4, 1984, at Plaintiff's request, the state court issued an order to show cause to Defendant, directing him to appear at a hearing to show why he should not be held in contempt for failure to obey a prior discovery order. Service of this order was allegedly made on Defendant in New Jersey, and a copy was also delivered to the offices of Defendant's counsel, Donald Rinaldo, a New Jersey attorney. Both Defendant and Mr. Rinaldo deny receipt and claim to have no knowledge of the existence of the show cause order or hearing. As a result, neither appeared at the hearing.

When Defendant failed to appear at the show cause hearing on May 22, 1984, at Plaintiff's request, the state court struck his answer to Plaintiff's complaint. On June 5, 1984, the state court entered default judgment against

Defendant, finding Defendant had engaged in conduct amounting to “oppression, fraud or malice.” The state court awarded Plaintiff a money judgment for \$204,990.60, including approximately \$85,000 of punitive damages. The judgment also declared Plaintiff to be the sole owner of the Court Room and the Solana Beach property. The state court later authorized its clerk to execute all necessary documents to transfer title to these assets to Plaintiff.

Years later, the events of which have no bearing here, Defendant found himself in Idaho, where in 1993 he filed the bankruptcy case. Defendant testified he first became aware of the existence of the California money judgment against him held by Plaintiff when she filed this adversary action. In her adversary complaint, Plaintiff asks this Court to declare her claims against Defendant excepted from discharge under theories based upon Section 523(a) of the Bankruptcy Code. Each of Plaintiff’s theories for relief are discussed below.

III. Discussion

A. Section 523(a)(2)(A).

Plaintiff asserts her claims against Defendant are nondischargeable under Section 523(a)(2)(A). This provision of the Bankruptcy

Code excepts from discharge a debt obtained through “false pretenses, a false representation, or actual fraud.” 11 U.S.C. § 523(a)(2)(A). To invoke the protections of this statute, a creditor must prove, by a preponderance of the evidence, see *Grogan v. Garner*, 498 U.S. 279, 291 (1991), that: (1) the defendant made a representation; (2) which at the time the defendant knew was false; (3) the representation was made with the intent to deceive; (4) the plaintiff relied on the representation, and; (5) the plaintiff sustained the alleged loss as the proximate result of the representation. *American Express v. Hashemi (In re Hashemi)*, 104 F.3d 1122, 1125 (9th Cir. 1996), cert. denied, 520 U.S. 1230 (1997).

1. False Representation

Plaintiff asserts that Defendant represented to her that if she would sell her Fairview Avenue property in New Jersey, Defendant would use the money to purchase a residence in San Diego (the Solana Beach property), and a business (the Court Room), of which Plaintiff would be the sole owner.²

From the testimony at trial, it is clear Defendant took an active role in personally and financially helping Plaintiff and the children following the

² Plaintiff’s allegations concerning the precise misrepresentations to her by Defendant have been, at times, inconsistent. The Court personally questioned Plaintiff at trial concerning what she understood Defendant “promised” her if she would move to California, and it is her responses that are discussed above.

divorce. Plaintiff experienced financial difficulties and relied upon Defendant for advice and aid at various times prior to moving to California. Defendant's idea for the move to California would provide a financial benefit to Plaintiff, and at the same time would allow Defendant to replace child support payments through income from the restaurant, and to engage in yet another business venture.

As a matter of disputed fact, the Court finds Defendant did not represent to Plaintiff as she contends that he would purchase her a house and business in California, of which she would be the sole owner, if she would agree to sell her home in New Jersey. Instead, the Court finds the record shows Defendant represented to Plaintiff that if she wanted to move to California, Plaintiff could work at the Court Room as the bookkeeper, as she had worked at Defendant's other restaurant ventures, and that Defendant would find a home in which she could live in California.

There was no representation that Plaintiff would be the sole owner and shareholder of the newly-acquired restaurant. In fact, Plaintiff herself has never represented she owned 100% of the business until this adversary proceeding. In the state court litigation, Plaintiff alleged she and Defendant had purchased the business together, each owning a 50% interest. In other documents, including the liquor license application for example, Plaintiff again

failed to assert an ownership interest, although she had an opportunity to do so, instead claiming to be the Secretary/Treasurer of the corporation. As such, she signed the stock certificate issued in Defendant's favor as the sole owner. All factors considered, the Court adopts the testimony of Defendant on this point as the more credible, and finds Defendant did not represent to Plaintiff that she would be the sole owner of the Court Room.

Next, it is unclear whether Defendant represented to Plaintiff that he would purchase a house in California which she would own, or just that he would purchase a house in which she could live. Once again, in weighing the evidence, the Court finds the latter appears to be the case.

Both the business and Solana Beach property were purchased prior to the sale of the New Jersey home, so it is doubtful the parties agreed that the proceeds of the New Jersey house would be used to finance the California purchases. Defendant, once the Fairview Avenue property was sold, placed approximately \$80,000 of funds in the jumbo CD, representing Plaintiff's interest in the New Jersey home consistent with the terms of divorce property settlement agreement. If Defendant intended to purchase the Solana Beach property as a replacement of the Fairview property, and even overlooking the significant disparity in value of the two properties, the Court cannot understand why

Defendant would preserve Plaintiff's \$80,000 interest in the Fairview property through the CD. Consistent with his position that he was holding the money for Plaintiff (as opposed to having invested it in the California home), Defendant also changed his will and made Plaintiff a beneficiary of his insurance policies. Under Plaintiff's view, in effect, Defendant would have owned the invested cash and the California home, something far beyond that contemplated by the divorce settlement.

Plaintiff received significant financial benefits from moving to California. She had a steady job, and paid her housing expenses and her salary out of the Court Room's income. Plaintiff's interpretation of the agreement of the parties concerning her move to California is flawed. The more logical explanation for the circumstances is that Defendant represented to Plaintiff he would purchase a home in California in which Plaintiff and the children could reside. Because he was not purchasing a replacement for the Fairview property, Defendant felt compelled to protect the \$80,000 value of the Fairview property, by placing a corresponding amount in a CD for the Plaintiff's benefit.

The Court finds and concludes that Defendant did not make the representations alleged by Plaintiff in her Complaint. Any representations actually made by Defendant to Plaintiff were not false. For this reason, Plaintiff's

claims cannot be excepted from Defendant's bankruptcy discharge under Section 523(a)(2)(A).

2. Intent to Deceive

Even if this Court were to determine Defendant made false representations to Plaintiff, the record is void of evidence showing Defendant intended to deceive Plaintiff.

Intent to deceive is a question of fact which may be inferred from the surrounding circumstances of the case. *Cowen v. Kennedy (In re Kennedy)*, 108 F.3d 1015, 1018 (9th Cir. 1997). "A promise made with a positive intent not to perform or without a present intent to perform satisfies [Section] 523(a)(2)(A)." *McCrary v. Barrack (In re Barrack)*, 217 B.R. 598, 606 (9th Cir. B.A.P. 1998) (quoting *In re Rubin*, 875 F.2d 755, 759 (9th Cir. 1989)).

Here, in addition to any benefit he may personally enjoy, Defendant's purpose in asking Plaintiff to relocate was to help his former spouse and his children. Not only did Defendant intend to perform, he made good on any promises extended to Plaintiff. Defendant purchased a restaurant in California, employed Plaintiff as the bookkeeper, and provided a home in which Plaintiff and the children could live. Therefore, the Court concludes Defendant did not intend to deceive Plaintiff as required by Section 523 (a)(2)(A).

3. Loss

Finally, Plaintiff has not proven she sustained a loss in relying upon Defendant's misrepresentations. The state court, after what this Court considers Plaintiff's questionable procedural maneuvering, granted Plaintiff all the relief Defendant had allegedly promised her: full ownership of the house and business. Moreover, while the money judgment granted Plaintiff by the state court represents a claim against Defendant entitled to respect in this proceeding, Plaintiff did not prove how any amounts represented by that judgment were occasioned by Defendant's wrong doing for purposes of Section 523(a)(2)(A).

B. Section 523(a)(4)

Plaintiff next alleges Defendant committed fraud or a defalcation while occupying a fiduciary capacity towards Plaintiff. She alleges Defendant misused the CD and that he mismanaged the Court Room during the state court litigation.

Section 523(a)(4) excepts from discharge in bankruptcy any debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." 11 U.S.C. § 523(a)(4). The meaning of the term "fiduciary capacity" is a question of federal law and has been limited only to an express trust, a technical trust, or a statutory trust. *Lewis v. Scott (In re Lewis)*, 97 F.3d 1182,

1185 (9th Cir. 1996); *Woodworking Enterprises, Inc. v. Baird (In re Baird)*, 114 B.R. 198, 202 (9th Cir. B.A.P. 1990). “[T]he broad, general definition of the term ‘fiduciary’ under state law, which typically describes a relation involving confidence, trust, and good faith, is generally not applicable in the context of a nondischargeability proceeding under [Section] 523(a)(4).” George H. Singer, *Section 523 of the Bankruptcy Code: The Fundamentals of Nondischargeability in Consumer Bankruptcy*, 71 AM. BANKR. L. J. 325, 366 (1997). It is not sufficient for purposes of Section 523(a)(4) to show merely that one party occupies a position of trust toward another, even such as to impose equitable responsibilities under state law.

While the Bankruptcy Code is silent concerning the allocation of the burden of proof under Section 523(a), generally a party objecting to the discharge carries the burden of proving of that objection. *Otto v. Niles (In re Niles)*, 106 F.3d 1456, 1460 & n. 3 (9th Cir. 1997). In the context of Section 523(a)(4), the objecting party must first establish the existence of a fiduciary relationship. *Fowler Brothers v. Young (In re Young)*, 91 F.3d 1367, 1371 (10th Cir. 1996). Courts are directed to look to state law in determining whether an express or technical trust exists. *Ragsdale v. Haller*, 780 F.2d 794, 796 (9th Cir. 1986); *In re Abrams*, 229 B.R. 784, 789 (9th Cir. B.A.P. 1999). Constructive,

resulting, or implied trusts are not protected by Section 523(a)(4). *Baird*, 114 B.R. at 202.

Defendant admits receiving approximately \$28,000 from the sale of the Fairview Avenue property for the benefit of Plaintiff. He also used house sale proceeds to pay off the mortgage on the property, for which he was obligated. He used the net sale proceeds, together with his other funds to purchase a “jumbo” CD to take advantage of higher interest rates. In this fashion, Defendant intended to compensate Plaintiff for the value of the New Jersey house. Defendant’s testimony suggested he appreciated his general obligations to Plaintiff assumed by holding the money in the CD. In discharging his obligations, Defendant provided additional protection for Plaintiff through his will and the use of several life insurance policies. Once Defendant believed in good faith he owed no further duty to Plaintiff, he used the funds in the CD for his own purposes, including paying school expenses for at least one of his children.

In addition, during the state court litigation, Defendant was directed by the court to exercise “the highest standard of care with respect to his operation, conduct, management and promotion of the [Court Room], to that of a fiduciary . . . so that the interest of plaintiff . . . will be fully and completely

protected.” Defendant’s Exhibit 253: Order and Preliminary Injunction at p. 6. During the period Defendant operated under this standard, he negotiated the relocation of the Court Room and leased new premises under his name.³ Defendant also was required to expend substantial amounts of his personal funds to finance the move and subsequent remodel of the replacement premises.⁴

Plaintiff objects to Defendant’s conduct while owing her what she contends were fiduciary duties regarding these transactions. While the Court acknowledges Defendant’s status as to Plaintiff could arguably fall within a broad definition of a fiduciary relationship, Plaintiff has failed to establish the existence of a fiduciary relationship for purposes of Section 523(a)(4). See *Evans v. Pollard (In re Evans)*, 161 B.R. 474, 478 (9th Cir. B.A.P. 1993) (state

³ The relocation was required when the former premises used by the Courtroom were sold and the landlord notified the Courtroom it would be required to move. Defendant found a nearby location, negotiated a lease, and the Courtroom relocated to its present location. This move was, therefore, not only made in the exercise of business judgment, it was compelled.

⁴ Plaintiff complains Defendant borrowed \$105,000 to help finance the move and remodel, using the Solona Beach property as security. However, over \$90,000 of this amount went to pay off the balance on the purchase debt of the Court Room, and the balance was made available to the business for its use. Defendant also contributed significant amounts of his own funds to this project. All told, the Court concludes debt was incurred by Defendant in the exercise of appropriate business judgment to ensure survival of the business. In addition, it appears Plaintiff expressly consented to use of the house as security for the business loan.

court judgment finding a fiduciary relationship was not a fiduciary relationship under Section 523(a)(4)). Plaintiff can show no statutory or other legal basis, whether under New Jersey or California law, necessary for creating a technical or express trust under Section 523(a)(4), thereby imposing fiduciary responsibilities on Defendant.

Once again, however, even if the record were to support a conclusion that Defendant was a fiduciary for bankruptcy purposes vis-a-vis Plaintiff, Defendant committed no defalcation. “Defalcation is defined as the “misappropriation of trust funds or money held in any fiduciary capacity [or] the failure to properly account for such funds.” *Lewis v. Scott (In re Lewis)*, 97 F.3d 1182, 1186 (9th Cir. 1996) (quoting Black’s Law Dictionary 417 (6th ed. 1990)). Because this Court concluded that Defendant did not occupy a fiduciary capacity for purposes of Section 523(a)(4) and that there was no identifiable trust res, Defendant cannot be guilty of misappropriation of trust funds or the failure to account for such. Thus, Defendant did not commit a defalcation under Section 523(a)(4).

C. Section 523(a)(6)

Plaintiff also requested relief under Section 523(a)(6), which excepts from discharge any debt for a willful and malicious injury by the debtor to

another. 11 U.S.C. § 523(a)(6). The Supreme Court has announced that in order for a debtor's act to be considered willful under this statutory provision, the act must be akin to that of an intentional tort under state law, and the actor must intend the consequences or injury resulting from the act rather than just the act itself. *Kawaauhau v. Geiger*, ---U.S.---, 118 S.Ct. 974, 977 (1998). This standard requires a debtor commit more than a reckless or negligent act.

Plaintiff asserts Defendant converted her interest in the CD. The basic elements of conversion include: (1) the plaintiff's ownership or right to possession of the property at the time of conversion; (2) defendant's conversion by a wrongful act or disposition of the property or property rights; and (3) damages. *Burlesci v. Petersen*, 68 Cal. App. 4th 1062, 1066, 80 Cal. Rptr. 2d 704, 706 (Ct. App. 1998). Defendant admits spending the money in the CD, including funds that at one time belonged to Plaintiff. Thus, Defendant arguably committed an act of conversion.

In *Geiger*, the Supreme Court discussed *McIntyre v. Kavanaugh*, 242 U.S. 138 (1916), a case in which the Court held a judgment for conversion fell within the discharge exception. To apparently limit a broad interpretation of the prior case, the Court noted "that not every tort judgment for conversion is exempt from discharge." *Geiger*, 118 S.Ct. at 978. If the conversion is a result

of a negligent or reckless act, it will not qualify as “willful and malicious” under Section 523(a)(6).

Defendant left California for his new job in New Jersey with the understanding that his differences with Plaintiff were settled. With this understanding, Defendant believed he was entitled to the entire CD. While Defendant could not recall how the entire CD was spent, he did testify to using some of the funds to pay for his son David to attend pilot training school. Given the involvement of the parties’ lawyers and long-term legal action between the parties, spending the money in the CD, or at least that portion belonging to Plaintiff, before having certain knowledge that the state court litigation had in fact been formally settled, was a naive, even negligent, act by Defendant. However, Defendant’s use of the funds was not intended to harm Plaintiff. Under *Geiger*, the Court concludes Defendant’s conversion of the CD was not a “willful and malicious” injury covered by Section 523(a)(6).

IV. Conclusion

For the reasons set forth above, Defendant’s obligations to Plaintiff under the state court judgment are subject to discharge in his bankruptcy case. A separate judgment will be entered by the Court in this action in favor of the

Defendant and dismissing Plaintiff's claims under 11 U.S.C. §§ 523(a)(2)(A), 523(a)(4), and 523(a)(6).